82-269

No.——

Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CRAIG POLLARD and HENRY MEADOWS,
Petitioners,

v.

THE CITY OF DETROIT, THE DETROIT POLICE DEPARTMENT, WILLIAM L. HART a/k/a CHIEF OF POLICE; GEORGE BENNETT a/k/a DEPUTY CHIEF OF POLICE and PHILLIP TANNIAN a/k/a FORMER CHIEF OF POLICE,
Respondents

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK W. JACKSON (P 23168)
Assistant Corporation Counsel
WILLIAM DIETRICH (P 12769)
Supervising Assistant
Corporation Counsel
ATTORNEYS FOR RESPONDENTS
1010 City-County Building
Detroit, Michigan 48226
(313) 224-4550

Information Brief & Record Co., Suite 701, David Whitney Building, Detroit, MI 48226
(313) 961-4760

QUESTIONS FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE FEDERAL DISTRICT COURT DECISION OF GRANTING SUMMARY JUDGMENT?

A. Did Petitioners Have A Right To A Predetermination Hearing?

B. Did Respondents Violate Petitioners' Rights Under 24 USC 1983?

C. Were Petitioners Proper Parties Under 42 USC 1985(3)?

II. DID THE COURT OF APPEALS ERR IN AFFIRMING THE DISTRICT COURT'S DECISION TO DENY PETITIONERS' MOTION TO AMEND?

A. As a Rule 59(e) Motion, Petitioners' Motion Is Untimely And Should Be Denied.

B. Petitioners' Motion Failed To Set Forth Any Reason For Granting The Relief Requested By A Rule 59(e) Motion.

C. Petitioners' Rule 60(b) Motion Was Unjustified.

D. Petitioners Did Not State Adequate Grounds For Permission To Amend Under Rule 15(a), F.R.C.P.

TABLE OF CONTENTS

	Page
QUESTION FOR REVIEW	i
TABLE OF AUTHORITIES	iv
COUNTER-STATEMENT OF CASE	1
COUNTER-STATEMENT OF RELELVANT FACTS	3
ARGUMENT	
I. THE FEDERAL DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT	10
A. Petitioners Had No Right To A Predetermination Hearing	10
B. Respondents Did Not Violate Petitioners' Rights Under 24 USC 1983	14
C. Petitioners Were Not Proper Parties Under 42 USC 1985(3)	19
II. THE DISTRICT COURT PROPERLY DENIED PETITIONERS' MOTION TO AMEND	21
A. As a Rule 59(e) Motion, Petitioners' Motion Was Untimely And Should Have Been Denied	21
B. Petitioners' Motion Failed To Set Forth Any Reason For Granting The Relief Requested By A Rule 59(e) Motion	23
C. Petitioners' Rule 60(b) Motion Was Unjustified	25
D. Petitioners did not state adequate grounds for permissin to amend under Rule 15(a), F.R.C.P	26
CONCLUSION	30

TABLE OF AUTHORITIES

Page

Cases:

Arnold v. Tiffany, 487 F2d 216 (1973) 20

Bishop v. Wood, 426 US 341, 48 L Ed 2d 684, 96 S Ct 2074 (1976) 11,13

Briley v. California, 564 F2d 849 (1977) 20

Detroit Police Officers Association v. City of Detroit, 391 Mich 44, 214 NW2d 803 (1974) .. 12

Detroit Police Officers Association v City of Detroit, 61 Mich App 47, 233 NW2d 49 12

Eria v. Texas Eastern Transmission Corp., 377 F Supp 344 (1974) 27

Field v. Local 652, United Auto Workers, AFL-CIO, 6 Mich App 140 (1967) 14,18

Foman v. Davis, 371 US 178, 9 L Ed 2d 222, 83 S Ct 227 (1962) 23,24,26,27

Freeman v. Continental Gin Co., 381 FRD 459 (1967) 24,29,30

Geigil v. Sea Land, 44 FRD 1 (1968) 24

Griffin v. Breckenridge, 403 US 88, 91 S Ct 1790, 24 L Ed 2d 338 20

Hines v. Anchor Motor Freight, Inc., 424 US 554 96 S Ct 1048 14

Kasey v. Molybdenum Corp. of America, 467 F2d 1284 (1972) 27

Kavela-Norman-Dickson School District v. Kavela-Norman-Dickson Teachers Assn., 393 Mich 583, 227 NW2d 500 (1975) 19

Page

Kinney Shoe Corp v. Vorhes, 564 F2d 859 (1977) 20

Parks v. Mr. Ford, 68 FRD 305 (1975) 21,22

Prostrollo v. University of South Dakota, 63 FRD 9 (1974) 25

Republic Steel v. Maddox, 379 US 650, 13 L Ed 2d 280, 85 S Ct 614 14

Rockwell v. Crestwood School District, 393 Mich 616, 227 NW2d 736 (1975) 11,12

Rowe v. Tennessee, 431 F Supp 1257 (1977) 20

Salwer Paper v. Merril Lynch, 79 FRD 130 (1978) 24,26

Scott v. City of Ann Arbor, 76 Mich App 535, 257 NW2d 157 10

United Mine Workers v. Gibbs, 383 US 715, 16 L Ed 2d 218, 86 S Ct 1130 (1966) 26

United Steelworkers of America v. American Manufacturing Co., 363 US 564, 4 L Ed 2d 1403, 80 S Ct 1343 (1960) 19

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 US 593, 4 L Ed 2d 1424, 80 S Ct 1358 (1960) 19

United Steelworkers of America v. Warrior-Gulf Navigation Co., 363 US 574, L Ed 2d 1409, 80 S Ct 1347 (1960) 19

Page

Statutes:

United States Constitution, Amendment Fourteen, Section 1 13,14

Michigan Constitution (1963) Article 7 § 22 12

42 USC 1983 14

42 USC 1985(3) 9,19,20

MCLA 117.1 et seq 12

MCLA 423.201 et seq 11,12

Court Rules:

FRCP 12(b)6 2

FRCP 15(a) 26,27

FRCP 59(e) 21,22,23

FRCP 60(b) 23,25

No.——

IN THE

Supreme Court of the United States

October Term, 1982

CRAIG POLLARD and HENRY MEADOWS,
Petitioners,
v.
THE CITY OF DETROIT, THE DETROIT POLICE DEPARTMENT, WILLIAM L. HART a/k/a CHIEF OF POLICE; GEORGE BENNETT a/k/a DEPUTY CHIEF OF POLICE and PHILLIP TANNIAN a/k/a FORMER CHIEF OF POLICE,
Respondents

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTER-STATEMENT OF CASE

Petitioners filed this petition after the U.S. Court of Appeals for the Sixth Circuit affirmed a decision by the Honorable Charles W. Joiner of the Federal District Court, Eastern District of Michigan, Southern Division. The decision was reflected in his Opinion and Order dated January 16, 1980 dismissing Petitioners Complaint and his dated March 16, 1980 denying Petitioners' motion to amend their complaint and further dismissing

all federal claims alleged in their Complaint with prejudice in addition to all remaining state claims. A judgment reflecting the Order of March 16, 1980 was entered by the Court on March 26, 1980.

Judge Joiner dismissed Petitioners' second amended complaint for the reason that "A thorough reading of the (second amended) complaint has convinced the Court that while there are a number of substantial disagreements between the parties, *none of them* involves due process of law. The termination procedure that was used by Defendant involves numerous levels of due process, and despite what may be some :nissteps in that procedure, this court could not find that the Plaintiffs' due process rights have been violated *under the facts as pleaded*." (Emphasis added)

Subsequent to the January 16, 1980 Order, on January 28, 1980, Petitioners filed a motion for order allowing them to amend their second amended complaint and at the same time filed the proposed amended complaint.

The Court after consideration of Petitioners' request to amend their complaint denied their motion for the reason that the proposed third amended complaint was also lacking as it failed to state a claim upon which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. As a result of Judge Joiner's decision, all relief was denied under federal law with the remaining elements of Petitioners' case dismissed for lack of jurisdiction.

COUNTER-STATEMENT OF RELEVANT FACTS

On or about May 24, 1974, the Petitioners were suspended from the Detroit Police Department because each was indicted by a Grand Jury. Both individuals were subsequently brought to trial and acquitted of criminal wrongdoing.

Subsequent to the criminal trial, the Police Department administratively charged Henry Meadows with:

> "Charge One: Neglecting to report any member of the Department known to be guilty of violation of any rule, regulation or order issued for the guidance of the Department.
>
> Specification One: That he, Police Officer Henry C. Meadows, of the Tenth Precinct did while on duty on December 1st, 1972, neglect to report a member of the Department, to wit, Police Officer Craig J. Pollard of the Tenth Precinct, who is known to Officer Meadows to be guilty of a violation of the Department to wit: that Police Officer Craig J. Pollard accepted a bribe of money, One Thousand Dollars, to effect the release of a police prisoner, to wit: Charles Williams; this being in violation of General Order 72-17, Section K, Subsection 50.
>
> Charge Two: Willfully making a false, oral or written statement or report.
>
> Specification Two: That he, Police Officer Henry C. Meadows, of the Tenth Precinct did while on duty on September 5th, 1972, willfully make a false written statement on a search warrant affidavit, thereby advising the Court, to wit: Recorder's Court, City of Detroit, Michigan,did

receive on eight previous occasions information from a reliable informant in an effort to obtain a search warrant for Apartment 103 of 3750 Chicago, Detroit, Michigan, this being in violation of General Order 72-17, Section K, Subsection 7.

Charge Three: Neglecting to turn over all property found, seized or taken from persons arrested to the proper officer without unnecessary delay.

Specification Three: That he, Police Officer Henry C. Meadows of the Tenth Precinct did while on duty on September 5th, 1972, take from a person arrested, to-wit: Judson L. Mathis, approximately Seven Hundred Dollars, did thereafter neglect to turn the approximately Seven Hundred Dollars over to the proper officer without unnecessary delay; this being in violation of General Order 72-17, Section K, Subsection, 36.

Specification Four: That he, Police Officer Henry Meadows of the Tenth Precinct did while on duty on September 6, 1972, seize property, narcotics, heroin, at the scene of a police narcotics raid at Apartment 102 at 2648 Rochester, Detroit, Michigan; did thereafter neglect to turn the seized property over to appropriate police authorities without unnecessary delay; this being in violation of General Order 72-17, Section K, Subsection 36.

Specification Five: That he, Police Officer Henry C. Meadows of the Tenth Precinct did on September 22nd, 1972, neglect to turn over to the proper departmental officer without unnecessary delay all property found, seized or taken from

persons arrested, to-wit: That he, Police Officer Henry C. Meadows, delivered fourteen packets of narcotics, heroin, to a citizen, to-wit: Ronald Johnson, this being in violation of General Order 72-17, Section K, Subsection 36.

Specification Six: That he, Police Officer Henry C. Meadows of the Tenth Precinct did on September 6, 1972, neglect to turn over all property found, seized or taken from persons arrested to the proper departmental officer without unnecessary delay; in that Police Officer Henry C. Meadows deposited a quantity of narcotics in the garbage can at the rear of 3900 Joy Road, Detroit, Michigan; this being in violation of General Order 72-17, Section K, Subsection 36."

The Police Department charged Mr. Craig Pollard with:

"Charge One: Participating or becoming involved in any arrangement between criminals and persons who have suffered by their acts with a view to permitting the defendant to escape from penalties provided by law.

Specification One: That he, Police Officer Craig J. Pollard of the Tenth Precinct, did on December 1st, 1972, enter into an agreement with a police prisoner, to-wit: Charles L. Williams, a suspected dealer in the trafficking of illegal narcotics, to accept the bribe of One Thousand Dollars in cash in return for the release of Charles Williams from police arrest; this being in violation of General Order 72-17, Section K, Subsection 45.

Charge Two: Accepting bribes of money, valuable services or any other form of compensation or consideration.

Specification Two: That he, Police Officer Craig J. Pollard of the Tenth Precinct did while on duty on December 1st, 1972, release from police custody a prisoner, to-wit: Charles L. Williams, after Police Officer Craig J. Pollard had received a bribe of One Thousand Dollars from Charles L. Williams; this being in violation of General Order 72-17, Section K, Subsection 14.

Charge Three: Willfully make a false, oral or written statement or report.

Specification Three: That he, Police Officer Craig J. Pollard of the Tenth Precinct, did while on duty on Spetember 5th, 1972, willfully make a false written statement on a search warrant affidavit, thereby advising the Court, to-wit: Recorder's Court, City of Detroit, that he had received information from a reliable informant on numerous occasions in an effort to obtain a search warrant for Apartment 102 of 2648 Rochester, Detroit, Michigan; this being in violation of General Order 72-17, Section K, Subsection 70.

Charge Four: Neglecting to report any member of the Department known to be guilty of violation of any rule, regulation or order issued for the guidance of the Department.

Specification Four: That he, Police Officer Craig J. Pollard of the Tenth Precinct, did while on duty on September 6, 1972, neglect to report a member of the Department, to-wit: Police Officer Henry

C. Meadows of the Tenth Precinct, who was known to Officer Craig J. Pollard to be guilty of a violation of an order of the Department; to-wit: That he, Police Officer Henry C. Meadows, had neglected to turn over all property found, seized or taken from persons arrested through appropriate police authority without delay; this being in violation of General Order 72-17, Section K, Subsection 50.

Charge Five: Neglecting to turn over all property found, seized or taken from persons arrested to the proper officer without unnecessary delay.

Specification Five: That he, Police Officer Craig J. Pollard of the Tenth Precinct, did on September 6th, 1972, being then accompanied by Police Officer Henry C. Meadows of the Tenth Precinct, seized property, narcotics, heroin, at the scene of a police narcotics raid at Apartment 102 at 2648 Rochester, Detroit, Michigan, and did thereafter neglect to turn the seized property over to appropriate police authorities without unnecessary delay; this being in violation of General Order 72-17, Section K, Subsection 36.

Specification Six: That he, Police Officer Craig J. Pollard of the Tenth Precinct, did while on duty of September 5th, 1972 take from a person arrested, to-wit: Judson L. Mathis, approximately Seven Hundred Dollars, did thereafter neglect to turn the approximately Seven Hundred Dollars over to the proper departmental officer in a timely manner, this being in violation of General Order 72-17, Section K, Subsection 36."

On or about October 28, 1974, Mr. Philip Tannian, then Chief of Police, had these charges read to Petitioners in the presence of their attorney at a Chief's Hearing. Petitioners were then discharged from the Police Department; they suffered no additional loss of benefits or pay. At the conclusion of the hearing,[1] the Petitioners exercised their discretion to have a de novo hearing by demanding a trial board. A Trial Board was held before three executive police officers of the Detroit Police Department in accordance with the Charter of the City of Detroit, the Rules and Regulations and the collective bargaining agreement between the City of Detroit and the Detroit Police Officers Association.

The Trial Board found Mr. Meadows and Mr. Pollard guilty of all charges, from that decision the Petitioners herein, appealed to a panel of arbitrators. The Panel consisted of two partial arbitrators, one each appointed by the Department and the Plaintiffs, through their Union representative. A third and independent arbitrator was mutually agreed upon and jointly selected by the parties thereto.

An Arbitration Hearing was held in which both parties gave oral argument. Briefs were submitted. The Trial Board record was placed before the Arbitration Panel. It issued an opinion and award. In essence, the Arbitration Panel reversed the Trial Board on all but two charges, being Mr. Pollard's acceptance of a bribe on December 1, 1972 and Mr. Meadows' inaction in the face of his knowledge of the bribe. The Arbitration Panel then remanded the case back

---

[1] A Chief's Hearing is not an adversary hearing in which both sides present a formal adversary hearing. It is the basis in which charges are formally brought to a person's attention. Said individual may or may not accept the Chief's decision as final.

to the Trial Board to determine if the penalty should be altered in the face of the Arbitration Panel's action. The Arbitration Panel also retained jurisdiction of the matter in order to review the Trial Board's decision, should the Grievants, Mr. Meadows and Mr. Pollard, demand a second review.

The Trial Board reaffirmed the penalty of discharge. Neither the City of Detroit nor the Arbitration Panel received a demand for review of the Trial Board's reaffirmance.[2]

On October 24, 1978, Petitioners filed suit in the U.S. District Court, Eastern District of Michigan, for breach of employment contract, for breach of union contract, wrongful discharge, libel and slander, and for deprivation of constitutional and civil rights. The case was assigned to Judge Charles Joiner. Respondents answered and pled various affirmative defenses.

Petitioners subsequently filed an Amended Complaint, which Respondents answered, with affirmative defenses.

Respondents then filed a Motion For Judgment On The Pleadings And/Or Partial Judgment On The Pleadings And/Or Summary Judgment And/Or Partial Summary Judgment, on November 14, 1979; on December 4, 1979 Oral Argument was made before Judge Joiner. On January 16, 1980, having already dismissed (October 8, 1980) those claims, based upon 42 USC 1985(3) as a result of Oral Motion, Judge Joiner dismissed all other claims against Respondents. Judge Joiner gave Petitioners until January 25, 1980 to file an amended complaint.

---

[2] Petitioners raised for the first time that they requested their Union to go back to arbitration. That assertion was never brought to anyone's attention prior to seeking this writ of certiorari.

On January 29, 1980, Petitioners filed what they denominated as their Third Amended Complaint. Respondents filed Objections and Briefs In Support thereof.

Judge Joiner denied the Motion To Amend. From this decision, Petitioners appealed to the U.S. Court of Appeals for the Sixth Circuit. There, the Court of Appeals affirmed the District Court's decision. After a request for rehearing was denied, Petitioners requested that a Writ of Certiorari issue.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE FEDERAL DISTRICT COURT'S DECISION TO GRANT SUMMARY JUDGMENT

A.

Petitioners Had No Right To A Predetermination Hearing

It is submitted that Petitioners failed to identify the basis for their assertion that they had a right to prehearing determination, as public employees, before suspension without pay or termination of employment. This failure was inevitable, given the state of Michigan law and the collective bargaining agreement in effect at the time of their termination.

In Michigan, there is no dispute that a non-union, untenured employee serves at the pleasure of the public employer; said individuals are entitled to no hearing of any type. *Scott* v. *City of Ann Arbor*, 76 Mich App 535; 257 NW 2d 157. It is also clear that Michigan law

determines if there is a right that could have been violated. *Bishop* v. *Wood*, 426 US 341, 48 L Ed 2d, 684, 96 S Ct 2074 (1976). The questions raised here are based in part on the alleged right to a hearing prior to termination. There exists no such right independent of statute or contract in Michigan. In *Rockwell* v. *Crestwood School District*, 393 Mich 616, 227 NW 2d 736, (1975), the Michigan Supreme Court was faced with the question of whether school teachers, who were on strike, could be discharged without a prior hearing, without violating due process. The Michigan Supreme Court answered:

> "We conclude that a teacher, including a teacher on continuing tenure, who strikes in violation of the PERA[3] may be disciplined without a prior hearing and we reverse the circuit court and the Court of Appeals."

The Michigan Supreme Court went on to state at 633-634 that:

> "When the government seeks to deprive a person of a property right — and we accept, arguendo, that a teacher's statutory rights under the teacher's tenure act constitute property — due process requires a 'hearing appropriate to the nature of the case.' *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950). 'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' *Boddie* v. *Connecticut*, 401 US 371, 378; 91 S Ct 780; 28 L Ed 2d 113 (1970). 'The types of 'liberty' and

---

[3] The Court used the phrase "PERA" for the Michigan Public Employment Relations Act, being MCLA 423.201 et seq.

'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.' *Arnett* v. *Kennedy*, 416 US 134, 155; 94 S Ct 1633; 40 L Ed 2d 15, 34 (1974). 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers* v. *McElroy*, 367 US 886, 895; 81 S Ct 1743; 6 L Ed 2d 1230 (1961)."

As noted by the Michigan Supreme Court, it is within the framework of PERA[4] that the wages, hours and working conditions of employment are established and maintained for public employees. Under PERA's mandate, a collective bargaining agreement was reached between the City of Detroit and the DPOA. Said agreement recognized the City's inherent right to discipline, without the requirement that it first provide for a hearing before the imposition of discipline.

Even before this collective bargaining agreement went into effect, the City of Detroit long exercised its right, establishing its own personnel system, as a Home Rule City,[5] which allows for termination of tenured employees without a hearing prior to the termination.

---

[4] PERA is the dominent statute in Michigan in terms of public employment. Collective bargaining agreements reached under PERA supercede charter and ordinance provisions that are in conflict. See *DPOA* v. *City of Detroit*, 391 Mich 44; 214 NW 2d 803 (1974); *Rockwell, supra; DPOA* v. *City of Detroit*, 61 Mich App 47, 233 NW 2d 49 (1975).

[5] Article 7, § 22 Michigan Constitution; MCLA 117.1 et seq.

This Honorable Court should not disturb the City of Detroit's personnel policy as it violates no federal statute or constitutional provision. This policy in no way violates any state or local rights secured by the Fourteenth Amendment of the U.S. Constitution. It is a local decision that is particularly appropriate with police officers who are charged with the highest standards of behavior. It is submitted that the interests of the City outweigh the interests of the individual in the instant situation. The right of the people to not have on its payroll individuals believed to be perpetrators of wrongdoing is paramount. The City's policy should not be disturbed merely because a court may not like it; indeed, *Bishop, supra*, teaches at 349-350 that:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error."

In any case, the City's policy as to termination prior to hearing was and is subject to negotiation. The DPOA and the City of Detroit negotiated whether the City of Detroit should have the right to proceed as it did in the instant case. As stated by the Arbitrator, infra, the City of Detroit did act in accordance with the terms of the collective bargaining agreement.

In short, Petitioners had no right to a hearing prior to discipline under Michigan law or by contract.

B.

Respondents Did Not Violate Petitioners' Rights Under 42 USC 1983

Petitioners' basic claim is that certain property rights, secured by the Fourteenth Amendment of the United States Constitution, through 42 USC 1983, were violated by Respondents.[6] Respondents submit that this is a manifestly untrue statement as the record of the instant matter so demonstrates.

It must first be noted that virtually every charge as to contract violation and charter[7] made before the District Court, the Court of Appeals, and now here, was raised and dealt with before an arbitration panel which reversed in part, affirmed in part, and remanded back to the Trial Board that part of which was affirmed for a decision as to the penalty in light of the initial review by the Arbitration Panel. It must also be noted that subsequent to the penalty of discharge being reinstated a second time, Petitioners did *not* seek further review by the Arbitration Panel, as was their right. On this basis alone, Respondents believe that this Court should follow both Michigan and Federal case law and affirm the District Court's decision. *Republic Steel Corp.*, v. *Maddox*, 379 US 650; 13 L Ed 2d 580; 85 S Ct 614; *Hines* v. *Anchor Motor Freight, Inc.*, 424 US 554, 96 S Ct 1048, 47 L Ed 231 (1976); *Field* v. *Local 652 UAW AFL-CIO*, 6 Mich App 140 (1967).

---

[6] The "liberty" interests allegations do not appear until the "Third Amended Complaint."

[7] The Charter of the City of Detroit, in terms of employee-employer relationships, is part of the collective bargaining agreement between the City of Detroit and Petitioners' Union.

The foundation of Petitioners' claim is that their due process rights were violated because they had a right to the expectation of continued employment, without first having a hearing prior to termination, which would determine their fitness to remain on the job. Petitioners also assert that they should not have been suspended, nor should they have had to wait two years after initial suspension to have a Trial Board. These rights, they say, violated the collective bargaining agreement between their union, the Detroit Police Officers Association, hereafter the DPOA, and the Charter of the City of Detroit.[8]

Respondents have searched Petitioners Brief to this Honorable Court in vain in search of those sections of the collective bargaining agreement and of the Charter that Petitioners rely upon in support of these claims. Respondents submit that they do not exist. Indeed, Respondents submit that Petitioners attempt to make mockery of an elaborate process agreed to by their union and the City of Detroit that not only guarded their rights, but that protected the integrity of the City of Detroit; it is ironic because they were willing participants in that process that delayed the Trial Board. Respondents respectfully refer this Honorable Court to Arbitrator McCormick's Opinion and Award (Petitioners' Appendix pp. 77-78) where he stated in pertinent part that:

> "The timeliness of filing of the charges is also in dispute. *Sponick* v. *Detroit Police Department*, 49 Mich App 162 (1973) holds that rudimentary due process requires, *inter alia*, timely written

---

[8] Petitioners lost their pay and benefits more than a year before the 1974 Charter went into effect.

notice detailing the reasons for proposed administrative action. Here, the incident occurred December 1, 1972, the officers were indicted by a grand jury on May 24, 1973, suspended the same day because of the indictments, found not guilty by a jury in September, 1974, formally charged in disciplinary proceedings in October, 1974, brought before a Chief's Hearing the same month, and had a Trial Board hearing on eight days in May, 1975.

Under all the circumstances, the indictments issued in 1973, the same day as the suspensions, adequately put the grievants on notice as to the Department's suspicions concerning specified criminal conduct on their part. *It was the long-standing custom, mutually agreed to by City and Association, that Trial Board proceedings awaited the results of parallel criminal proceedings. At no time did grievants demand a Trial Board in advance of their felony trials. Accordingly, the failure to hold a Chief's Hearing or a Trial Board until after the criminal verdict was not a violation of rudimentary due process of law.*

Neither was the failure to file formal disciplinary charges and specifications at an earlier date a violation of basic fairness. Once the criminal charges were out of the way it became timely to proceed with any disciplinary proceedings deemed appropriate. *The charges were then itemized, and contained nothing new to grievants. They had ample time to study the specific charges prior to their Trial Board which was a de novo trial of the facts."* (Emphasis added)

As stated by the Arbitrator, this procedure, which included pre-hearing suspensions and termination, had been mutually agreed to and in fact was a "long standing custom."[9] Petitioners seek here to create employment and contractual rights where none have existed prior to the date of this lawsuit being started.

The agreement not to start Trial Board proceedings immediately exists primarily to protect those who are criminally charged. Petitioners did not want to be defending themselves in two different forums at the same time. Petitioners, as those similarly situated, did not want to be tried or convicted by a Trial Board prior to being tried for virtually the same things in a criminal court for tactical reasons. Thus, Petitioners were active participants in the decision to delay the Trial Board until after the completion of the criminal trial.

Once the criminal trial was completed, Petitioners were quickly charged in detail and brought before the Trial Board. Nothing new was alleged at the Trial Board. Petitioners did not and could not allege that they were surprised, as Arbitrator McCormick so found.

After reading nearly 1,000 pages of Trial Board transcript, reviewing the exhibits, reading the briefs of legal counsel for both sides, the Arbitration Panel unanimously reversed all but two substantive charges against the Petitioners; by majority vote the Panel upheld two substantive charges and remanded the matter back to the Trial Board to reconsider the discharge

---

[9] Petitioners were represented at the Arbitration Hearing, at the Trial Board, and at the Criminal Trial by the same law firm. This law firm was paid for and supplied by their union, the DPOA.

This is particularly significant in that both their union and the law firm were well aware of the provisions of the collective bargaining agreement and of the bargaining history between the City of Detroit and the Union.

penalty in light of its actions; the Arbitration Panel retained jurisdiction to review the new decision on the penalty, should review be requested. Although the discharge penalty was reaffirmed, Petitioners did not request a new hearing before the Arbitration Panel.

Petitioners did not exhaust their administrative remedy as is required prior to resorting to the courts. See *Field* v. *Local 652 UAW AFL-CIO*, 6 Mich App 140. Petitioners do not now, nor did they at a prior time, assert that the exhausting of said administrative remedies would have been futile. Nor did they assert that their union refused to take the matter back to arbitration, until *this* petition was filed.

It is also important to note that Petitioners raised for the first time a new alleged contract violation. They complained that William L. Hart, now Chief of Police, sat on the Trial Board. They assert that this is inherently unfair. Petitioners neglect to point out that Mr. Hart was not the Chief of Police at the time the Trial Board heard and decided the case. Second, Petitioners failed to point out that upon remand to the Trial Board, only the Arbitration Panel had any authority to review the second leveling of a penalty.

Indeed, were there never an appeal to arbitration, the Chief of Police[10] has *no* authority to review a Trial Board Decision except at the request of the officer charged with the offense; except for arbitration, a Trial Board's Decision is final and not subject to further administrative review.

---

[10] Prior to July 1, 1974, the effective date of the present Charter of the City of Detroit, the Chief of Police was denominated the "Police Commissioner". Even then, the Chief could only lower the penalty.

Petitioners did not attempt to exercise their right to go back to the Arbitration Panel. In essence, they seek now to hold Respondents to blame for their failure. In so doing, Petitioners seek to give to the Courts the duties assigned to the Arbitration Panel — that is deciding the merits of the grievance under the contract. Under Michigan law, the Courts venture not into the bailwick of the arbitrator. See *Kavela-Norman-Dickson School District* v. *Kaleva-Norman-Dickson School Teachers Association*, 393 Mich 583, 227 NW 2d 500 (1975). Michigan follows the Federal courts on this point. See *United Steelworkers of America* v. *Warrior-Gulf Navigation Co.*, 363 US 574; 4 L Ed 2d 1409; 80 S Ct 1347 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 US 593; 80 S Ct 1358; 4 L Ed 2d 1424 (1960); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 US 564; 80 S Ct 1343; 4 L Ed 2d 1403 (1960).

Respondents think that the Michigan Supreme Court stated it best where in *Kavela supra* at 595 it stated:

> "Where a court finds itself weighing the pros and cons of each party's interpretation of substantive provisions of the contract it is likely that the court has gone astray."

It is submitted that Petitioners seek to have this Court, as it sought below, go astray by deciding again the merits of the Arbitration case.

C.

Petitioners Were Not Proper Parties Under 42 USC 1985(3)

It is well settled that for a person to file suit of this statue, it is necessary that the tortfeasor be discriminating against people on the basis of race or another

invalid classification. See *Griffin* v. *Breckenridge*, 403 US 88, 91 S Ct 1790, 24 L Ed 2d 338; *Briley* v. *California*, 564 F2d 849 (1977); *Rowe* v. *Tennessee*, 431 F Supp 1257 (1977). Petitioners failed to allege that they were part of a class that would come within the ambit of 42 USC 1985(3).

To be sure, in their Second Amended Complaint, they implicitly alleged that there existed a class of police officers "who because they refuse to take part in official wrongdoing are stigmatized and subjected to severe and discriminatory departmental scrutiny and discipline . . ." . Still, it stretches the imagination too far to assert that anytime a person refuses to take part in illegal activities, that he or she belongs to a class protected by 42 USC § 1985(3).

Respondents *do not here, as they did not below*, assert that 42 USC 1985(3) must always be one of racial classification. Respondents do assert that there existed no allegation by Petitioners that would, if true, support a claim of violation of 42 USC 1985(3). Petitioners do not identify which law, privilege or immunity they lost the equal protection thereof.

In any case, as aforestated, 42 USC 1985(3) provides no general tort remedy. *Kinney Shoe Corp.* v. *Vorhes*, 564 F 2d 859 (1977). The situation here is much like that found by the Court of Appeals in *Arnold* v. *Tiffany*, 487 F 2d 216 (1973). The actions allegedly taken by Respondents were done because Petitioners alleged failure to participate in official wrongdoing, not because Petitioners were members of a class traditionally subjected to invidious discrimination. This is not the stuff of which *Griffin, supra*, spoke.

IV.

THE DISTRICT COURT PROPERLY DENIED PETITIONER'S MOTION TO AMEND

Respondents' Motion To Amend to allow the submission of the purported Third Amended Complaint was properly denied by the District Court for several reasons.

A.

As A Rule 59(e) Motion, Petitioners Motion Was Untimely And Should Have Been Denied.

Respondents respectfully assert that Petitioners' Motion for permission to amend their Complaint, was at that stage of the proceedings, actually a motion under Rule 59(e), F.R.C.P. to vacate judgment and is a device to seek leave to amend the complaint. As stated in *Parks* v. *Mr. Ford*, 68 FRD 305 (1975):

> "There can be no doubt that a motion under Rule 59(e) is the proper procedural vehicle to use when a party seeks to vacate, alter, or amend a summary judgment, even though there has not been a trial of the matter, *Sonnenblick* v. *Goldman Corp.*, supra, 420 F. 2d at 858-859, *Tucker* v. *Reading Co.*, 335 F. Supp. 1269, 1270 (E.D. Pa. 1971). Moreover, a motion under Rule 59(e) may be used to vacate the judgment, and thereafter as a device to seek leave to amend the complaint, see *Foman* v. *Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), *Ginsburg* v. *Stern*, 242 F.2d 379, 380 (3d Cir. 1957) (Rule 60(b)), *Kelly* v. *Delaware River Joint Commission*, 187 F. 2d 93, 94-95 (3d Cir. 1951)"

Rule 59(e) provides as follows:

> "Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

As further stated in *Parks* v. *Mr. Ford, supra* at 307, the ten day rule is mandatory and is measured by the time of service of the motion:

> "The law is clear that *the ten day requirement of Rule 59(e) is mandatory and may not be extended by the trial court.* Rule 6(b), (F.R. Civ. P.), see *Steward* v. *Atlantic Refining Company*, 235 F.2d 570, 571-572 (3d Cir. 1956), notwithstanding an agreement of the parties to enlarge this period, *Nugent* v. *Yellow Cab Company*, 295 F.2d 794, 795-796 (7th Cir. 1961) cert. den. 369 U.S. 828, 82 S.Ct 844, 7 L. Ed. 2d 793. However, *the rule merely requires that the motion be served, rather than filed of record, within ten days,* provided that it is filed within reasonable time after it is served, Rule 5(d), (F.R.Civ.P.), *Keohane* v. *Swarco, Inc.* 320 F.2d 429, 430-432 (6th Cir. 1963). Rule 5 (b) provides that service may be made upon counsel for a party by mail, and further specifies that such service is complete upon mailing, see *Stover* v. *Universal Moulded Products Corporation*, 11 F.R.D. 90, 91 (E.D. Pa. 1950)." (Emphasis added)

Petitioners did not meet the procedural requirements for a Rule 59(e) motion. Service upon opposing parties was not made until January 29, 1980, thirteen days after entry of the order granting summary judgment, or twelve days after the Respondents received notice of the order. Having failed to serve their motion within ten days after entry of judgment, Petitioners waived their right to the

relief requested. The ten day requirement of Rule 59(e) is mandatory. *Parks* v. *Mr. Ford, supra*, at 307.

B.

Petitioners' Motion Failed To Set Forth Any Reason For Granting The Relief Requested By A Rule 59(e) Motion.

Petitioners offered no argument in support of a Rule 59(e) motion to alter or amend judgment. They have apparently concluded that the amendment which they requested earlier, and which was granted failed to state a claim against Respondents.

Where a proposed amendment states an alternative theory of recovery, there may be justification for a court exercising its discretion to grant a motion to vacate the judgment in order to allow amendment of the complaint. See, *Foman* v. *Davis*, 371 US 178, 9 L Ed 222, 83 S Ct 227 (1962), in which the United States Supreme Court found error in the District Court's denial of such a motion where the proposed amendment would state an alternative theory for recovery. No such justification existed in the instant case. Respondents' motion and proposed amendment did not raise any new theory. The motion merely asserted that the theory which Respondents requested permission to allege does not apply to the instant Respondents, so they should be allowed to recant their complaint once again in an attempt to state a claim under theories already dismissed. The foregoing was not a ground upon which to grant the relief requested.

Even if an alternative theory of relief, or new facts, had been raised in the proposed amended complaint, there was no requirement that the District Court grant a Rule 59(e) or Rule 60(b) motion to vacate in order to amend after an order of summary judgment has been entered as

to the Counts sought to be added to or clarified. As there is no right to amend once the order of dismissal has been entered, leave to amend was discretionary. *Salwer Paper* v. *Merril Lynch*, 79 FRD 130 (1978).

Reasons frequently offered for denial of motions to vacate judgment and refusal of permission to amend are:

> "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Foman* v. *Davis*, 371 US 178, 182, 9 L Ed 2d 222, 83 S Ct 227 (1962).

If the instant proposed amendments are found to contain any alternative theories of recovery or new facts, to justify amendment those new elements must do more than restate the original allegations.

Even if the proposed amendment contained more than restatement in new language, there remained a heavy burden of justification for relief from judgment in order to seek leave to amend. See *Geigel* v. *Sea Land*, 44 FRD 1 (1968). To have subjected Respondents to a series of amendments without end would have been a substantial prejudice to their rights as litigants. See, *Freeman* v. *Continental Gin Company*, 381 FRD 459 (1967), where the court noted that amendment is often denied even before judgment is entered. The instant matter involves a motion to amend after judgment is entered as to the counts sought to be amended. Petitioners were terminated in October, 1974 with the administrative appeal concluded by June, 1975. Respondents had asserted the three year statute of limitations, among other defenses, to Petitioners' claims. To have allowed amendment of pleadings to cure defects which could

have been cured before summary judgment would have further prejudiced Respondents' right to rely upon the protection of the three year statute of limitations. See, *Krum* v. *Sheppard*, 255 F Supp 994.

C.

Petitioners' Rule 60(b) Motion Was Unjustified

If the "new evidence" which Petitioners offered as justificaton for Rule 60(b) relief is of a cumulative nature and would not change the result of the ruling as to Counts I and II, Petitioners themselves admit that the summary judgment of January 16, 1980 should not be disturbed. Petitioners did not allege in their motion how the facts are not cumulative, but merely stated in conclusory terms that the alleged facts state a cause of action. See *Prostrollo* v. *University of South Dakota*, 63 FRD 9 (1974). Rule 60(b) provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances. *Prostrollo*, 63 FRD 9, 11. The "new" evidence *referred to was available to Respondents before the order of summary judgment was entered*. Petitioners could have, if exercising the requisite due diligence, made their motion for leave to amend before judgment. Instead they waited and sought extraordinary relief under Rule 60(b). The requirements clearly are not met and such relief should be denied.[11]

Petitioners attempted to justify reopening the dismissal of Counts I and II of the complaint in order to secure pendent jurisdiction for the newly constituted

---

[11] Petitioners asserted that the facts were not available prior to filing their first amended complaint. The first amended complaint was filed in 1978. Petitioners did not seek discovery until August 31, 1979, more than 10 months after starting the lawsuit. Petitioners lack of diligence weighed heavily against the filing of yet another complaint.

allegations of common law breach of contract contained in Count III of the proposed amendment. Where, however, federal claims have been dismissed, or are subject to dismissal, then there is no federal jurisdiction for the state law claims. See, *United Mine Workers* v. *Gibbs*, 383 US 715, 726, 86 S Ct 1130, 16 L Ed 2d 218 (1966). As stated in *Salwer* v. *Merrill Lynch, supra*, at 137:

> "[12] Finally the proposed amended complaint repeats, with little or no alteration, the common law claims of the original complaint based on negligence (third and seventh claims), breach of contract (fourth claim) and common law fraud (sixth claim). It is well settled that if federal claims are subject to dismissal under Rule 12(b), then the allegedly 'pendent' common law claims should also be dismissed. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726, 86 S Ct 1130, 16 L Ed 2d 218 (1966); *Kavit* v. *A.L. Stamm & Co.*, 491 F 2d 1176, 1179-80 (2d Cir. 1974)"

D.

Petitioners did not state adequate grounds for permission to amend under Rule 15(a), F.R.C.P.

Petitioners cited the language of Rule 15(a) FRCP and *Foman* v. *Davis, supra*, as the authority upon which their request should be granted. Respondents assert that neither Rule 15(a) nor its interpretation in *Foman* v. *Davis* compel a court to grant permission to amend in the instant circumstances.

1. Petitioners failed to meet the basic test set forth in *Foman* v. *Davis*, that "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief." 371 US 178, 182. The District Court ruled on the merits of Counts I and II of the second amended complaint in its Order of Summary Judgment.

It thus established that the facts and circumstances relied upon by Petitioners were not a proper subject of relief. Petitioners sought, however, to amend the counts found wanting by adding and/or clarifying. As no new facts or theories were included in the proposed amendment, the request was properly denied.

Foman v. *Davis, supra*, sets forth other criteria for granting or denying permission to amend:

> ". . .undue delay, bad faith or dilatory motive on the part of the movant, *repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party* by virtue of allowance of the amendment, *futility of the amendment*, etc. . . ." 371 US 178, 183 (Emphasis added)

2. Petitioners had repeatedly failed to cure deficiencies in their case by previous amendment. While it is settled that amendments are freely given when the interests of justice would be served, amendments are *not* freely given to permit a restatement of the same facts in different language or the reassertion of a claim previously determined. *Kasey* v. *Molybdenum Corporation of America*, 467 F2d 1284, 1285 (1972). Where, as here, a proposed amendment went to the merits of a claim and put nothing in issue that had not already been resolved, Rule 15(a) does not require the allowing of the amendment.

As the proposed amendments to the complaint added nothing new in terms of fact or theory, the amendment was futile. A futile amendment is one which fails to set forth any new fact or theory which may cure the deficiencies of the complaint. As stated in *Erie* v. *Texas Eastern Transmission Corporation*, 377 F Supp 344 (1974):

> "While it is true that leave to amend a pleading is usually freely given, Federal Rule of Civil Procedure 15(a), if the amended pleading could be defeated by a motion for summary judgment, to grant leave to amend would be a futile gesture. *Foman* v. *Davis*, 371 US 178, 83 S Ct 227, 9 L Ed 222 (1962); 3 Moore Federal Practice (2d 3d. 1948) Paragraph 15.08[4]. Accordingly the court will proceed to a determination of the merits of the question. The legal sufficiency of the proposed amendment will guide the court in determining the efficacy or granting leave."

Respondents submit that the above issue was resolved previously by ruling of the District Court in its Memorandum Opinion and Order granting summary judgment as to Counts I and II of the second amended complaint. As stated by the District Court in its Memorandum Opinion:

> "The termination procedure that was used by the defendants involves numerous levels of due process, and despite what may be some missteps in that procedure, this court could not find that the plaintiffs' due process rights have been violated under the facts as pleaded." Memorandum Opinion, p.2

As there was no difference in substance between the Counts I and II dismissed on summary judgment and the proposed amended Counts I and II, the legal sufficiency of the new allegation was *res judicata*. Amendment would have been futile and improper.

If this Court should find any difference in substance between the dismissed allegations of Counts I and II and the recanted allegation of the proposed third amended Counts I and II, Respondents respectfully submit that the proposed amendments did not cure the fatal flaws in the complaint.

Counts I and II of the dismissed complaint were based on the constitutional guarantee to due process of law. Respondents reassert that due process requirements were met in the processing of Petitioners' suspensions and dismissals from the Detroit Police Department.

Petitioners had a de novo review of the Chief's decision to terminate their employment. The Police Trial Board found them guilty on all charges and affirmed the Chief's decision to dismiss. Petitioners then appealed the Trial Board decision to an outside Arbitration Panel, which affimed the findings of the Trial Board as to the charge of bribery and failing to report the same and remanded to the Trial Board for reconsideration of punishment in light of the modified findings. The Arbitration Panel retained jurisdiction to review the punishment decision. The Trial Board affirmed its earlier decision to dismiss. Respondents did not seek the further review of the Arbitration Panel. Petitioners characterize the proceedings as a denial of their due process rights. Respondents cannot see how the procedures described above failed to comply with the basic right to due process in the employment situation.

3. Prejudice to Respondents. To have allowed amendment of the complain at that stage of the proceedings would have unduly prejudiced Respondents. There has been ample opportunity for Petitioners to amend their complaint to allege additional or clarifying facts. While liberality in amendment is meant to assure fair opportunity to present claims and defenses, "equal attention should be given to the proposition that there must be an end finally to a particular litigation." *Freeman* v. *Continental Gin Company*, 381 F2d 459, *supra*. An amendment may be untimely and thus prejudicial to the opposing party, even before summary judgment has

been granted as to the counts proposed to be amended. See *Freeman, supra*, 381 F2d 459, 469. Here, Petitioners sought to amend after summary judgment, a ruling on the merits of their allegations. As there must be an end to litigation, and as Petitioners have had repeated opportunities to amend their complaint, Respondents would have been unduly prejudiced by the allowance of yet another amendment at that stage of the proceedings, where the amendment would not raise any new theory or set forth any new facts in support of those theories already dismissed. "A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim." *Freeman* v. *Continental Gin Company, supra*.

The sum of it all is that the Third Amended Complaint had and has no place in the instant lawsuit. Petitioners should rise or fall on their Second Amended Complaint. It is respectfully submitted that Petitioners should fall.

CONCLUSION

Respondents respectfully submit that this appeal should be affirmed for the reasons stated by the District Court or for those reasons raised by Respondents in Section II and III of this brief.

Respectfully submitted,

ATTORNEYS FOR RESPONDENTS

By: /s/ FRANK W. JACKSON (P 23164)
Assistant Corporation Counsel

/s/ WILLIAM DIETRICH (P 12769)
Supervising Assistant
Corporation Counsel
1010 City-County Building
Detroit, Michigan 48226
(313) 224-4559